Rento East Africa Limited v Mwend (Civil Appeal E002 of 2020)
[2022] KEHC 11546 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11546 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E002 OF 2020

LW GITARI, J

JULY 27, 2022

BETWEEN

RENTO EAST AFRICA LIMITED ..... APPELLANT

AND

ERICK MWEND ..... RESPONDENT

JUDGMENT

1. This is an appeal against the decision of the trial court in Chuka CMCC No. 289 of 2018. The claim therein was for general damages for pain and suffering, special damages as well as costs and interests of the suit in respect of a road traffic accident that occurred on May 24, 2018 along Kiang'ondu – Chuka road at Chuka Girls.

2. The accident involved the respondent, who was the rider of motor cycle registration number KMEE 559A, and the driver, servant and/or employee of the Appellant's motor vehicle registration number GKB 472J Subaru.

3. The trial court rendered its judgment on September 9, 2020in which it found the appellant 100% liable for the accident and award the respondent damages of Kshs. 600,000/= for pain and suffering and special damages of Kshs. 14,040/=.

4. Aggrieved by the said judgment, the appellant lodged the instant appeal vide the memorandum of appeal dated October 5, 2020. It prays for the appeal to be allowed and the judgment of the lower court be set aside on the following grounds:

    a. Thatthe Learned Magistrate erred in law and in fact by failing to appreciate that no negligence was established as against the appellant and as such no liability could attach.

    b. Thatthe Learned Magistrate erred in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the respondent as against the appellants.

c. Thatthe Learned Magistrate erred in both law and in fact when he awarded a sum of Kshs. 614,040/= as damages which amount is manifestly excessive and high in the circumstances and connotes an erroneous estimate of the damages suffered.

d. Thatthe Learned Magistrate erred in law and in fact in failing to consider or ever adequately adopt and appreciate the written submissions of the Appellant on record.

e. That the Learned Magistrate erred both in law and in fact in failing to find that the respondent's pleadings were incapable of sustaining any award of damages.

f. That the judgment of the learned trial Magistrate is against the law and weight of the evidence on record.

5. The appeal was canvassed by way of written submissions.

Appellant's submissions

6. The appellant filed his written submissions on January 28, 2022 in which it submitted only on the issue of quantum of damages It is safely concluded that the appellant abandoned the other grounds or argued them together. I will therefore adopt this approach and will not consider each ground separately. It was the appellant's submission that the amounts awarded by the trial court was inordinately high in the circumstances. The appellant relied on the medical report by Dr. Elvise Mark Mwandiki which stated that the respondent suffered bruises on the right palm, chin and abdomen, tender swollen right leg and right tibia fracture. Theappellant proposed an award of KShs. 400,000/= and cited the cases of *Daniel Otieno Owino & another v. Elizabeth Atieno Owuour* [2020] eKLR; *Gladys Lyaka Mwombe v. Francis Namatsi & 2 others* [2019] eKLR; and *DG (Minor suing through her next friend MOR v. Richard Otieno Onyisi* [2021] eKLR.

The Respondent's Submissions

7. The respondent filed his written submissions on March 1, 2022. It was his submission that the appeal was incompetent and irregularly on record as a copy of the decree was not attached to the record of appeal. He relied on the cases of *Municipal Council of Kitale v. Fedha* [1983] eKLR and *Kiboror v. Posts & Telecom Corporation* [1974] E.A. 155 to buttress this position.

8. On the issue of quantum, it was the respondent's submission that the award of KShs. 600,000/= for pain and suffering was commensurate with the injuries he sustained being fracture on the lower limb, tibia lower abdominal wound and lower chin wound. The respondent thus prayed for the appeal to be dismissed for the reason that the record of appeal was filed without a decree and that the trial court relied on sound legal principles in arriving at its decision.

Brief Facts:

This matter arises out of a road traffic accident which occurred along Chuka-Kibumbu road involving motor vehicle GKB 472J and motor cycle KMEF 559 A whose rider was Erick Mwenda who is the respondent herein. The motor cycle was heading towards Chuka from Kibumbu direction while the motor vehicle GKB472J was heading towards the opposite direction, that is Chuka to Kibumbu.

At the scene of accident, the driver of the GK B 472J who had to turn to the gate of Chuka Girls which was on the right side of the road, failed to give way to the cyclist to pass before turning towards the said gate. As a result the motor bike and the motor vehicle collided. It was the contention by the motor cyclist that the driver of the motor vehicle was to blame for the accident as he failed to give way. The respondent sustained injuries as follows:-

a. Bruises on the right palm, chin and abdomen

b. Tender swollen right leg.

c. Fracture of the tibia of the right lower limb.

The scene of the accident was visited and a police officer (PW1) who found that the driver of the motor vehicle was to blame for the accident. He produced a Police Abstract as exhibit.

9. The appellant did not adduce any evidence at the trial. The trial magistrate while relying on the case of *Aritar Sigh Bahara & another –v- Raju Govindi* H.C.C.C 584/1998 held that the driver of the motor vehicle GK B 472 J was to blame for the accident and found liability on the driver at 100% and vicarious liability on the appellant. He proceeded to award damages as stated above.

The Law:

Section 65 of the *Civil Procedure Act* provides:

> "(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court - (a) (Deleted by 10 of 1969, Sch.); (b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;
>
> (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors."

In the case of *Selle & another –v- Associate Motor Boat Company Limited and others* 1968) E.A 123, it was held that-

> "An appeal to this court is by way of a retrial and the principle upon which this court acts in such an appeal are well settled. Briefly put they are that this court must re-consider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in this respect....."

See also *Williamson Diamonds Ltd –v- Brown 1970 E.A* where the court stated that the first appellate court has a duty to consider both facts and the law.

This is a first appeal and therefore it is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well founded.

In line with this finding, I have analyzed the evidence presented before the learned trial magistrate. It is only the respondent who adduced evidence and called a witness. The decision of the trial magistrate was well founded as the evidence tendered by the respondent was not rebutted. The appellant did not challenge the grounds of negligence which were pleaded by the respondent.

The appellant did not substantiate his pleadings. The evidence in support of the finding on liability was uncontroverted. I find that based on the evidence adduced by the respondent negligence was established against the appellant.

It is my view that the appellant has abandoned grounds 1, 2, 4, 5 and6 which are challenging the finding of the learned trial magistrate based on the evidence and pleadings. The appellant has based his submission on ground No.3. It is my view that the finding by trial court was sound and based on the evidence tendered before him. The appeal on these grounds that 1, 2, 3, 4, 5 and 6 must therefore fail

I will proceed to consider the issues which arise for determination.

Issues for determination

10. The main issues for determination by this court are:

    a. Whether the failure to file a decree in the record of appeal is fatal to the appeal, and if not,

    b. Whether the award by the trial court was based on sound legal principles.

Analysis

a. Effect of failure to file a decree

11. Order 42 rule 13(4) of the *Civil Procedure Rules* 2010 provides as follows:

> " Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
>
> (a) the memorandum of appeal;
>
> (b) the pleadings;
>
> (c) the notes of the trial magistrate made at the hearing;
>
> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
>
> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
>
> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
>
> Provided that—
>
> (i) a translation into English shall be provided of any document not in that language;
>
> (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."

12. Under order 42 rule 13(4) of the *Civil Procedure Rules* 2010, a court may dispense with any document to be part of the record of appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. There is saving grace under article 159(2)(d) of *the Constitution* which gives the court the mandate to determine matters without regard to procedureal technicality. The rule specifically states that what is required at the appellate stage is judgment, order or decree appealed from. The word or connotes that any of these documents should be filed and where filed, the appeal is good for consideration. It is clear from the reading of the rule that it is not a mandatory requirements for an appellant to include both the judgment and the decree of the lower court in the record of appeal. It is however desirable for the appellant that the he attaches a Judgment and not attach a decree and omit the Judgment. In *Nyota*

Tissue Products –v- Charles Wanga & 4 others (2020) eKLR. Where the Court of Appeal dealt with the issue of failure by an appellant to file a decree; the court stated-

> " The rule applicable to the appeals in the High Court makes provision under order 42 rule 14(f) *Civil Procedure Rules* for the filing of a copy of the judgment order or decree and does not make it mandatory to attach the judgment and the decree."

It follows that lack of certified copy of the decree does not render the appeal defective. It is thus not correct for the respondent to urge the court find that the appeal is defective and should be struck out. To adopt such an approach is too draconian in the circumstances of this case where the Judgment of the lower court is annexed. The appellant attached a certified copy of the lower court Judgment in compliance with the rule. Section 1A &B of the *Civil Procedure Act* provides for the overiding objectives of the Act. The section provides:

> " 1A
>
> (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
>
> (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.
>
> 1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims—
>
> (a) the just determination of the proceedings;
>
> (b) the efficient disposal of the business of the Court;
>
> (c) the efficient use of the available judicial and administrative resources;
>
> (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and
>
> (e) the use of suitable technology."

The question is whether the respondent has suffered prejudice by the failure of the appellant to file the decree. The *Civil Procedure Act* defines a decree as follows:

> " The formal expression of an adjudication which so far as regards the court expressing it, conclusively determine the rights of the parties with regard to all or any matters in controversy in the suit and be either pre-liminary or final..... provided that for the purpose of appeal, decree includes Judgment and Judgment shall be appealable not withstanding the

fact that a formal decree in pursuance of that Judgment may not have been drawn up or may not be capable of being drawn up"

The court has discretion to dispense with any document. My view is that where the appellant has annexed the Judgment which is appealed against it would be draconian to strike out the appeal. The respondent has ably argued the appeal which is a demonstration that he has not suffered any prejudice. Order 42 rule 13 requires that the documents be on the record before allowing the appeal to proceed. The respondent did not object to the appeal but has proceeded to argue the appeal not withstanding the fact that the decree was not filed. It is my view that there is sufficient material to enable the court to determine the appeal other than order stricking out.

13. In the present appeal, a perusal of the record of appeal shows that the Appellant attached a copy of the judgment together with the certified copy of the lower court's proceedings. However, there is no certified copy of the decree attached as is mandatorily required. In veiw of the above decision and the reasons stated, I find that there is a competent appeal which this court has to consider and give a determination.

b. Liability and quantum

14. It is trite that the award of damages is an exercise of discretion by the trial court and an appellate court will not normally, interfere with that exercise unless it shown that the damages is so inordinately high or low as to represent an erroneous estimate, see *Butt-v- Khan* (1982-88) KAR

In *Simon Taveta –v- Mercy Mutitu Njeru*, (2014) eKLR, C.A. It was stated,

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

15 Similarly in *Kemfro Africa Ltd t/a Meru Express Service –v- A.M Lubia* (1982-88) Kneller J.A stated for the appellate court to interfere with an award of damages by the trial court,

It must be satisfied that either that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so in inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."

16. The contention by the appellant is that a reasonable amount ought to have been awarded as the amounts awarded were in the circumstances in–ordinately high. The medical report by Dr. Elvise Mark Mwandiki observed that the respondent suffered bruises on the right palm, chin and abdomen, tender swollen right leg and right *tabia* fracture. No permanent disability was noted by the doctor. The respondent stated that the injuries had healed properly.

17. The trial magistrate considered the case of *Clement –v- GKK* (2016) eKLR where the respondent had suffered a fracture of left tibia and bruises on the neck. An award of Kshs.600,000/- general damages was upheld on appeal. He further considered the case of *Vincent Mbogoli – v- Harrison Tunje Chilyakya* (2017)eKLR where the respondent was awarded Kshs.500,000/- for injuries involving left Tibia fracture, blunt trauma to chest and bruises. He also relied on *Beatrice Wairimu Wandunia – v- C.Dorman Limited* (2009) eKLR where Kshs.500,000/- was awarded for compound fractures of tibia and dislocation of left ankle joint. The award was in 2009. The trial magistrate stated that he was guided by the comparable awards for similar injuries and inflation rates affecting our economy. It is my view that in arriving at the award, the trial magistrate considered the correct principles by basing the award on the injuries sustained and comparable awards made in the past. I therefore have no reason

to interfere with the exercise of discretion by the trial magistrate. The award was not excessive in the circumstances. The finding on liability was based on the facts placed before the trial magistrate. No evidence was adduced before the trial magistrate to challenge the respondent's case.

Conclusion

18. In view of the foregoing, the appeal is without merits and is dismissed with costs.

Dated, signed and delivered at Chuka this 27th day of July 2022.

L.W. GITARI

JUDGE

27/7/2022

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

27/7/2022

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